SUPREME COURT, U. S.

FILED
JUN 19 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 177

GABRIEL FELICE,

Petitioner,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 1602

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Petitioner,

v.

THE LONG ISLAND RAIL ROAD COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

This action was brought by petitioner, an employee of respondent The Long Island Rail Road Company, for damages under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.* Judgment was entered in petitioner's favor in the sum of $100,460 in the United States District Court for the Southern District of New York after a trial before a jury. The United States Court of Appeals for the Second Circuit reversed that judgment because of prejudicial errors committed at the trial and remanded for a new trial.

Counterstatement of Questions Presented

The decision of the court of appeals does not deprive petitioner of his day in court, nor does it present any constitutional or other substantial question for review. Re-

spondent urged in the court below that it had been deprived of a fair trial by reason of the admission of improper evidence, surprise and an improper charge to the jury. The court of appeals agreed. The propriety of those rulings is the only question presented here.

Counterstatement of the Case

The facts of the case are adequately set out in the opinion of the court of appeals. Contrary to petitioner's Statement of the Case, there was substantial evidence—consisting largely of contemporaneous admissions by petitioner—to support respondent's position that petitioner's back injury had resulted not from slipping or falling down but merely from lifting a heavy object.

Argument

The court of appeals correctly held as follows on each of the points urged by respondent below:

1. Where two witnesses were equally available to both sides but were called by neither, it was error for the trial court to instruct the jury, over respondent's objection, that it could draw an inference adverse to respondent for failing to call the witnesses without instructing the jury that it could also draw an inference adverse to petitioner.

2. It was error to permit a witness to read to the jury a self-serving statement by plaintiff contained in a document which (a) was never offered or received in evidence, (b) was never authenticated, (c) was not prepared by the witness, (d) did not refresh his recollection and (e) was improperly utilized at the trial in contravention of the pre-trial order.

3. It was error for the trial court to receive into evidence documents which (a) were prepared after the litigation had been commenced, (b) contained self-serving statements by petitioner concerning the cause of his injury and (c) were offered to prove the truth of the matters stated.

We do not know of any decision of this Court or of any other court which is in conflict with the court of appeals' rulings on those points.

Conclusion

It is respectively submitted that the petition should be denied.

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June 19, 1970.